UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Kemper Mortgage, Inc.,

Plaintiff,

v.

Case No. 3:06-cv-042
Judge Thomas M. Rose

Jeffery P. Russell,

Defendant.

ENTRY AND ORDER DENYING MOTION TO DISMISS, (DOC. 6), **AND DENYING MOTION FOR 28 U.S.C. § 1292(B) CERTIFICATION.**

Plaintiff has filed a complaint accompanied by a motion for a temporary restraining order that asserts that Defendant is in violation of various covenants not to compete with Plaintiff. Defendant has responded with a motion to dismiss for lack of personal jurisdiction. (Doc. 6). Plaintiff asserts that personal jurisdiction exists by virtue of a clause in an employment agreement stipulating to venue and choice of law, or, alternatively, by virtue of Ohio's long arm statute. Defendant counters that the employment agreement has been "abolished" and that minimum contacts do not exist. Because Ohio's Long Arm statute does confer jurisdiction, and because minimum contacts do exist, the Court will deny Defendant's motion to dismiss.

I. Background

On March 3, 2005, Defendant Jeffery P. Russell executed an employment agreement with representatives of Plaintiff Kemper Mortgage, Inc. The centrality of the employment agreement to the question of personal jurisdiction in this case merits reproduction of several portions:

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> 1. Employment: Employer hereby employs Employee as a /Assist To Dir of Opns/ and Employee accepts such employment subject to the terms and conditions contained herein….
>
> 2. At-Will Employment Status: …Employer has the right to change wages, benefits and other terms and conditions of Employee at any time.
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> * * * * *
>
> 4. Non-Disclosure of Employer's Confidential Information: ….
>
> 5. Solicitation: Employee shall not, during the term of this Agreement and for a period of two (2) years after the expiration of the term of this Agreement, directly or indirectly…hire away any employees, agents or independent contractors of Employer. …
>
> 6. Restrictions: Employee agrees that, should a court of competent jurisdiction declare any portion of this Agreement invalid, … such court shall reduce or amend the Agreement so as to make such offending provision(s) valid and the remaining Agreement shall remain unaffected.
>
> 7. Venue and Choice of Law: The parties agree that in the event of a dispute between the parties, any and all disputes shall be litigated in the Circuit Court of Montgomery County, Ohio.[1] In addition, Ohio law will be applied in the event of a dispute between the parties.
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> * * * * * * *

[1] The courts of first instance in the Ohio state system are referred to as "Common Pleas Court." Ohio Const. art. IV § 4. "Circuit Courts" were courts of appeal in Ohio from around 1885 to 1912 that had jurisdiction to retry questions of fact and law *de novo* on appeal. See *State ex rel. Welch v. Deneen*, 1915 WL 1310, *1 (Ohio App. 1915) and *Sicker v. Powers*, 74 N.E.2d 638, 639 (Ohio App. 1946) (citing Ohio Const. of 1912 art. IV § 6). Defendant may wish to consider updating its forms.

> 12. Negotiation Agreement: The parties agree that this Agreement has been prepared as a result of their mutual arms-length negotiation and the Agreement shall not, in any respect, be interpreted or construed against either party as the purported drafter thereof.[2]

Russell signed the Agreement in Miamisburg, Ohio and worked out of Kemper's Miamisburg, Ohio office from March 1, 2005 until approximately May 1, 2005 as Assistant to the Director of Operations, Chris Rines. During this period, Russell also received training in Miamisburg, Ohio.

On May 1, 2005, Kemper promoted Russell to the position of Operations Manager for Kemper's Denver office. With this promotion, Russell received more pay and more responsibilities as a result. He became responsible for all facets of Kemper's Denver-based operations. He supervised recruiting efforts, sales and marketing efforts and had executive responsibilities in the administration and day-to-day operations of the Denver office. However, Russell at all times reported directly to Kemper's home office in Miamisburg, Ohio and remained in regular contact with his supervisors in Miamisburg through telephone call and email correspondence. In addition, Russell attended a long-range planning and marketing meeting in Miamisburg on November 17 and 18, 2005. During this meeting, a business plan was created which included a detailed and specific blueprint for the entire company, including marketing, budgeting, customer retention, production, recruiting and training. Business strategies were developed at the meeting.

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[2] The Court has no need of recourse to this doctrine, but, should a reviewing Court find this doctrine applicable, the court notes that the testimony was unanimous that the instant contract was not the result of a mutual arms' length negotiation, but rather, Plaintiff's form contract to which no changes were made.

In addition to his travel to Ohio specifically related to his employment with Kemper, Russell voluntarily traveled to Dayton, Ohio. In October, 2005, Russell was in Dayton for several days for a wedding. More recently, Russell spent the last week of December, 2005 in Ohio visiting his family.

Kemper filed its Complaint and Motion for a Temporary Restraining Order against Defendant in the Montgomery County, Ohio Court of Common Pleas. The complaint seeks remedies for Russell's alleged breaches of the agreement. Russell removed the action to federal court, alleging diversity of citizenship, after participating in an on-the-record TRO hearing in state court.

II. Analysis

"A restraining order or injunction is an *in personam* restraint issued against a party over whom the court has acquired *in personam* jurisdiction," "[i]f the court lacks personal jurisdiction over a party, it should not enter an injunction or restraining order against that party." 13 James Wm. Moore et al., Moore's Federal Practice § 65.61[1] (3d ed.2005); see also *Zimmerman v. U.S. Football League*, 637 F. Supp. 46, 47 (D. Minn. 1986) (stating that court cannot issue a temporary restraining order against defendants over whom it lacks personal jurisdiction); 11A Wright, Miller & Kane, Federal Practice and Procedure, § 2956 (stating that "[a] court ordinarily does not have power to issue an order against a person who is not a party and over whom it has not acquired personal jurisdiction").

The burden of establishing jurisdiction is on the plaintiff. *Welsh v. Gibbs*, 631 F.2d 436, 438 (6th Cir. 1980). If the district court determines to decide the issue solely on the basis of written materials, the plaintiff should be required only to make a *prima facie* case of jurisdiction, that is, he need only "demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss." *Id.* (quoting *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977)). However, if the district court concludes that the written submissions have raised issues of credibility or disputed issues of fact which require resolution, it may conduct a preliminary evidentiary hearing. *Id.*, at 438-39. Where this occurs the plaintiff must show by a preponderance of the evidence that jurisdiction exists. *Id.* Pursuant to Fed. R. Civ. P. 4(k), unless plaintiff can show that defendant is not subject to the jurisdiction of the courts of general jurisdiction of any state or unless it points to a statute of the United States authorizing service on the defendants in this case, this Court may exercise personal jurisdiction only if a court of general jurisdiction in Ohio could do so. Because this Court's subject matter jurisdiction is based on diversity of citizenship, the substantive law of Ohio governs the issue of personal jurisdiction. *Welsh v. Gibbs*, 631 F.2d 436, 440 (6th Cir. 1980); see also *Washburn v. Garner*, 2005 WL 1907530, *4 (W.D. Ky. 2005) (analyzing the existence of long-arm jurisdiction in a case involving a forum selection clause).

A. Contractual Agreement to Jurisdiction

Kemper's first asserted basis for the existence of personal jurisdiction over Russell is the employment agreement clause concerning venue and choice of law, which stipulates that "any and all disputes shall be litigated in the Circuit Court of Montgomery County, Ohio." ¶ 9. Kemper has brought to the Court's attention case law supporting the conclusion that a forum selection clause waives personal jurisdiction. *Preferred Capital, Inc., v. New Tech Enginee4ring, LP*, 2005 U.S. LEXIS 32619 (N.D. Ohio 2005) ("a consent to venue implies a waiver of or consent to personal jurisdiction because 'a waiver of objection to venue would be meaningless…if it did not also contemplate a concomitant waiver of objection to personal jurisdiction.") (quoting *Richardson*

Greenshields Secs. Inc v. Metz, 566 F. Supp. 131, 133 (S.D.N.Y. 1983). The Court has noticed other cases in this circuit involving forum selection clauses, however, which have chosen to entertain an objection to personal jurisdiction. *Washburn v. Garner*, 2005 WL 1907530, *4 (W.D. Ky. 2005)

The question is moot, however, since "the Circuit Court of Montgomery County, Ohio" does not exist. The only cases the Court could find on this question agree:

> The court's conclusion is supported by the only other federal case uncovered by the court's research that involved a forum selection clause naming a nonexistent forum. In *BP Marine Americas v. Geostar Shipping Co. N.V.*, Civ. A. No. 94-2118, 1995 WL 131056, at * 1 (E.D. La. March 22, 1995), the forum selection clause at issue stated: "The High Court in New York shall have exclusive jurisdiction over any dispute which may arise out of this Charter." Finding that the "High Court in New York" is a forum that does not exist, the court concluded that the clause was "sufficiently vague to render it unenforceable." *Id.* at *4. The court based its decision, in part, on the requirement that contracts be construed against their drafter: "Even if the Court were to conclude that it would be reasonable to interpret the clause as referring to federal court in New York, the ambiguity in the clause would be construed against Geostar, which proposed the amendments that have made the clause ambiguous." *Id.*

ORI, Inc. v. Lanewala, 1999 WL 1423068, *2 (D. Kan. 1999). While both of these cases rely in part upon the doctrine of *contra proferentum* in reaching their conclusion, this Court finds that tool of interpretation irrelevant. The contract is not ambiguous; it clearly demands an impossibility.

Neither does the Court believe that paragraph six of the agreement is implicated here, either. While that paragraph allows the Court to amend invalidated provisions, the Court has not found the instant provision invalid, merely impossible. No party has even requested that the action be remanded. If the provision were invalid, the Court finds the most reasonable amendment to be one which changes "Circuit Court" to "Court of Common Pleas." Again, no party has requested a remand to state court. The Court will thus consider whether the Ohio Long Arm Statute confers personal jurisdiction.

B. Long-Arm Jurisdiction

In Ohio, personal jurisdiction is proper if: 1) the state long arm statute authorizes jurisdiction; and 2) the exercise of jurisdiction is consistent with the due process requirements of the United States Constitution. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996). On a motion to dismiss, the plaintiff bears the burden to establish a *prima facie* case with respect to both elements. *Nationwide Mut. Ins. Co. v. Tryg Int'l Co., Ltd.*, 91 F.3d 790, 793 (6th Cir. 1996).

According to the Ohio Long-Arm statute:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:
>
> * * * * *
>
> (2) Contracting to supply services or goods in this state;

Ohio Rev. Code. § 2307.382(A)(2). Kemper alleges Russell has violated the non-compete agreement contained in a personal services contract Russell signed and began performing in Ohio. Thus, the requirements of the Ohio Long-Arm Statute are met.

C. Due Process Requirements

Although Ohio's Long-Arm Statute is satisfied, this Court may not exercise jurisdiction unless doing so comports with the requirements of due process. To meet the requirements of the Due Process Clause of the Fourteenth Amendment, 1) the defendant must have minimum contacts with the forum state; and 2) the exercise of personal jurisdiction must be consistent with traditional notions of fair play and substantial justice. *International Shoe Co. v. State of Wash.*, 326 U.S. 310, 316, 66 S.Ct. 154 (1945). Such minimum contacts may legitimize either: 1) general personal jurisdiction; or 2) specific personal jurisdiction. *Irizarry v. East Longitude Trading Co.*, 296 F.Supp.2d 862, 864-65 (N.D. Ohio 2003). A court has general personal jurisdiction over a defendant if that party maintains “continuous and systematic” contacts with a forum state. *Helicoperos Nacionales de Colombia v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868 (1984). Because Russell maintains no presence in Ohio, physical, corporate, financial, or otherwise, the Court cannot exercise general personal jurisdiction over this defendant.

Specific personal jurisdiction arises from a defendant's conduct vis-a-vis the forum state relative to the particular cause of action. This jurisdiction exists where: 1) the defendant purposefully avails itself of the privilege of acting in the forum state or causing a consequence in the forum state; 2) the cause of action arises from the defendant's activities; and 3) the acts of the defendant or consequence caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. *Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968). Jurisdiction is proper under the purposeful availment requirement where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum state. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475, 105 S.Ct. 2174 (1985). Moreover, the defendant's conduct and connection with the forum must be of a character that he or she should reasonably anticipate being haled into court there. *Id.* at 474. This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts. *Id.* at 475.

In the instant case, Russell purposely availed himself of the privilege of signing a contract in Ohio. The cause of action asserts breach of non-compete agreements contained in the contract signed in Ohio. Finally, the alleged consequences, harm to Kemper's business, have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Russell counters with an assertion that the contract has been abolished by his promotion to the Denver office. According to Russell, "[w]hen an employee is promoted to a new and distinct position, a new contract for employment is created." Doc. 9 at 2 (quoting *Clements v. Emery Worldwide Airlines, Inc.*, 44 F. Supp. 2d 1141, 1145 (D. Kan. 1999)). Assuming *arguendo* that this proposition applies to the instant case, Russell would still be subject to jurisdiction for violation of a contract that creates restrictions "for a period of two (2) years after the expiration of the term of this Agreement…." ¶ 5. Russell must prove not only the existence of a new contract, but the existence of a new contract in which Kemper has bargained away its rights under the old contract. Because there is no evidence that Kemper bargained away the two year restriction, Russell is subject to claims that he violated this contract.

III. Motion for Certificate of Interlocutory Appealability

Russell has moved for a certificate of appealability under 28 U.S.C. § 1292(b). Title 28 U.S.C. § 1292(b), provides for immediate appellate review:

> When a district court, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b). The Court of Appeals, in its discretion, may then permit an appeal to be taken if application to appeal is made to it within ten days after the district court's order. *Id.* An appeal pursuant to Section 1292(b) does not stay proceedings in the district court unless the district court or the court of appeals so orders. *Id.*

A party seeking permission to appeal an order pursuant to Section 1292(b) must show the following: 1) the question involved is one of law; 2) the question is controlling; 3) there is substantial ground for difference of opinion respecting the correctness of the district court's decision; and 4) immediate appeal would materially advance the ultimate termination of the litigation. *Vitols v. Citizens Banking Co.*, 984 F.2d 168, 170 (6th Cir. 1993)(per curiam)(citing *Cardwell v. Chesapeake & Ohio Ry. Co.*, 504 F.2d 444, 446 (6th Cir. 1974)). Review under § 1292(b)"should be sparingly granted and then only in exceptional cases." *Id.* at 170 (citing *Kraus v. Bd. of County Rd. Comm'rs*, 364 F.2d 919, 922 (6th Cir. 1966)); see also *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002).

The instant case does not provide a substantial ground for difference of opinion respecting the correctness of the decision. No evidence has been presented concerning an agreement by Kemper to forego its contractual rights created by the March 2005 contact. Even if there were, that would render the instance case one involving a factual dispute. Therefore, Russell's motion for 28 U.S.C. § 1292(b) certification is denied.

The Court will be in contact with the parties to schedule a hearing on Plaintiff's motion for a temporary restraining Order.

DONE and **ORDERED** in Dayton, Ohio, Thursday, February 16, 2006.

s/Thomas M. Rose

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THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE